In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY FEDERATION OF COMMUTERS CLUBS, and CONTRA COSTA COUNTY COMMUTERS ASSOCIATION,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES, and THE GREYHOUND CORPORATION,

Appellees.

Appeal from Judgment of the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' STATEMENT AS TO JURISDICTION.

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A. OPINIONS OF THE COURT BELOW.

The decision of the Court below is reported at 150 F.Supp. 619. The judgment of the Court below (T.

181-2)[1] is set forth in Appendix A. The majority opinion (T.167-2), and the concurring and dissenting opinion (T.175-80), are appended hereto as Appendix B and Appendix C, respectively. The decision of the Interstate Commerce Commission (T.9-38) is appended as Appendix D.

B. GROUNDS ON WHICH JURISDICTION IS INVOKED.

This action was commenced in the Court below to set aside an order of the Interstate Commerce Commission which authorized Pacific Greyhound Lines, a common carrier of passenger, to transfer certain of its local bus operations in the San Francisco Bay area to its newly created subsidiary, Golden Gate Transit Lines, without the necessity of obtaining the approval of the Public Utilities Commission of the State of California, under whose jurisdiction the operations are conducted. The District Court had jurisdiction under Sections 2321-5, 2284, 1366, and 1398, of Title 28 of the United States Code, and pursuant thereto a three-judge Court was convened for the purpose of hearing the matter (T.77).

The judgment of the District Court sustaining the order of the Interstate Commerce Commission was dated and entered May 3, 1957 (T.181-3). The notice of appeal was filed with the Clerk of the District Court on May 29, 1957 (T.184-6). On June 27, 1957, the time for docketing the case and filing the record

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[1]Transcript references herein relate to the typewritten transcript of the clerk of the lower Court. There is no reporter's transcript.

thereof with the Clerk of this Court was enlarged to and including September 2, 1957 (T.189).

This Court has jurisdiction pursuant to Sections 1253 and 2101 of Title 28, and Section 45 of Title 49 of the United States Code.

C. QUESTIONS PRESENTED.

1. Whether the exclusive and plenary power which Section 5 of the Interstate Commerce Act vests in the Interstate Commerce Commission with respect to consolidation and merger of carriers and carrier operations extends to a split-up of motor carrier operating rights under which an existing carrier proposes to transfer a portion of its operating rights to a newly created subsidiary which is not yet a carrier; or whether such a split-up falls under Section 212(b) of the Act with respect to the interstate operating rights, and under the jurisdiction of the appropriate state commission with respect to the intrastate rights.

2. Whether the Court abused its discretion in denying appellant's motion for leave to amend the complaint so as to challenge the sufficiency of the evidence on which the Interstate Commerce Commission based its decision, to challenge certain of the findings of the Interstate Commerce Commission as being contrary to the evidence or not based on any evidence, and to charge the Interstate Commerce Commission with abuse of discretion in denying appellants' petition for a rehearing.

D. STATEMENT OF FACTS.

Appellees Pacific Greyhound Lines (hereinafter called Pacific Greyhound), Golden Gate Transit Lines (hereinafter called Golden Gate), and The Greyhound Corporation, filed applications with the Interstate Commerce Commission on February 8, 1954, seeking authority under Section 5 of the Interstate Commerce Act for the transfer to Golden Gate of certain passenger bus operations conducted by Pacific Greyhound in the San Francisco Bay area in exchange for the issuance to Pacific Greyhound of all of Golden Gate's outstanding capital stock. After the hearing officer had recommended denial of the applications, the Interstate Commerce Commission reviewed the matter and issued its order on July 6, 1955, granting the applications and authorizing the transfer. Appellants, who had appeared and participated in the Interstate Commerce Commission proceeding as protestants, filed a petition for rehearing on August 11, 1955, which petition was denied by the Commission on September 19, 1955.

A complaint to annul the order of the Interstate Commerce Commission was filed with the Court below on October 18, 1955. The joint answer of appellees United States of America and Interstate Commerce Commission was filed on December 15, 1955, and the motion of Pacific Greyhound, Golden Gate, and Greyhound Corporation for leave to intervene as defendants was made and granted on January 9, 1956. The latter three appellees made a motion to dismiss the complaint, and appellees United States of America

and Interstate Commerce Commission made a motion for judgment on the pleadings.

These motions were argued and submitted on February 23, 1956. At the time of said argument, a dismissal with prejudice (T.113) was entered as to various labor unions, representing Pacific Greyhound's drivers and other employees, who had protested the application and had joined as plaintiffs in the Court below. The dismissal order was based on a stipulation entered into by the unions and appellees (T.111-2).

Appellants asked permission, at the time of argument of said motions on February 23, 1956, to amend the complaint (T.171-2), and promptly filed a motion for leave to amend and a proposed amendment (T. 114-33).

The complaint as originally filed challenged the order of the Interstate Commerce Commission on the single ground that Section 5(2) of the Interstate Commerce Act (Section 5, Title 49, United States Code) has no application to a split-up of motor carrier operating rights, such as is involved in this proceeding.

The proposed amendment challenged various specified findings of the Interstate Commerce Commission as unsupported by the evidence, including the finding that the transfer of the local operations to Golden Gate would serve the public interest by separating labor negotiations involving intercity drivers from those relating to local drivers. In this connection the proposed amendment alleges (T.118) that on Febru-

ary 21, 1956, Pacific Greyhound and Golden Gate entered into labor agreements providing that, if the proposed transfer were consummated, the employees of both companies would be covered by the same employment contracts.

The proposed amendment also challenged the sufficiency of the evidence to support the following findings, or implied findings, of the Commission: that Golden Gate would be financially able to perform the operations; that the intrastate operations in question constitute a burden on the interstate operations of Pacific Greyhound; that the California Public Utilities Commission has determined Pacific Greyhound's fares in the light of its system-wide operations and revenues;[2] that the alleged managerial efficiencies could not be achieved as well by creating separate operating divisions as by creating a separate subsidiary corporation; and that the requirement that Pacific Greyhound make a cash investment of $250,000.00 in Golden Gate (rather than $150,000.00 as proposed in the application) would render Golden Gate financially able to perform the service.

The proposed amendment also alleged abuse of discretion on the part of the Interstate Commerce Com-

[2]On the contrary, the amendment alleges (T. 117-8) that the California Commission has limited its consideration to Pacific Greyhound's intrastate operations in California. This is clearly shown by that Commission's decisions, including Decision No. 55,226, recently issued by the California Commission on July 9, 1957, in Applications Nos. 38,017, *et al.*, and not yet reported, in which Pacific Greyhound was allowed a rate of return, on its total California intrastate operations, of 7.1%. See also *Re Pacific Greyhound Lines* (1951) 50 Cal. P.U.C. 650, where a rate of return of 6.4% was allowed.

mission in denying appellants' petition for rehearing and reconsideration.

The motion to amend was argued and submitted on April 20, 1956. On April 12, 1957, the lower Court filed a memorandum order, signed by two of the three judges, dismissing the complaint with prejudice and denying the motion to amend. A concurring and dissenting opinion was filed by the third judge, expressing the view that the amendment to the complaint should be permitted. A judgment in accordance with the majority view was entered on May 3, 1957.

The operations in question consist of local bus service in the San Francisco Bay area, consisting principally of service between San Francisco and adjacent residential areas to the north, east, and south within a radius of approximately thirty miles (T.12). A large portion of the passengers are commuters traveling between their places of work in San Francisco and their homes in Marin and Contra Costa Counties, and the Peninsula area to the south of San Francisco.

Of the total traffic involved, 94.3% is intrastate commerce and 5.7% consists of passengers utilizing the local service as a part of an interstate trip (T.33). The intrastate operations are conducted pursuant to certificates of public convenience and necessity issued by the Public Utilities Commission of the State of California, which has jurisdiction over the rates and service. Under the order of the Interstate Commerce Commission the intrastate certificates of public convenience and necessity would be transferred to Golden

Gate without the necessity of obtaining any approval from the California Public Utilities Commission.

The purpose of this transfer is obvious and has been conceded by appellees (T.29). It is to escape the regulatory principles applied by the California Public Utilities Commission, including the rule that in passing upon applications by a carrier for an increase in rates in a particular segment of its operations, the Commission will take into consideration the total earnings of the carrier from all of its intrastate operations in California, as well as to avoid certain obligations assumed by Pacific Greyhound when it undertook the Marin County operations, as outlined at length in the dissenting opinion (T.175-80; App.C, *infra*).

The transfer of operating rights as proposed in the application to the Interstate Commerce Commission contemplated that Pacific Greyhound would transfer to Golden Gate working capital of only $150,000.00. The Interstate Commerce Commission found this amount inadequate and conditioned its approval of the transfer on the furnishing of $250,000.00 as working capital (T.34). This was predicated on the finding that Golden Gate would incur a deficit of approximately $150,000.00 during its first year of operation (T.34). In their petition for rehearing and reconsideration filed with the Interstate Commerce Commission, appellants requested an opportunity to present additional evidence to the effect that on July 28, 1955 (after the issuance of the Interstate Commerce Commission's decision), Pacific Greyhound had taken the position in testimony before the Public Utilities

Commission of the State of California that its working capital requirements for performing the services involved in this proceeding would be in excess of $320,000.00. Attached to the petition was a verbatim transcript of the testimony to this effect given before the Public Utilities Commission of California by the same Pacific Greyhound executive who had testified before the Interstate Commerce Commission that working capital of $150,000.00 would be sufficient.

The denial of this petition for rehearing was one of the grounds on which appellants sought to attack the order of the Interstate Commerce Commission in their motion to amend their complaint.

E. REASONS FOR CONSIDERATION BY SUPREME COURT.

1. The interpretation placed on Section 5(2) of the Interstate Commerce Act by the lower Court ousts the jurisdiction of state regulatory commissions over the transfer of wholly intrastate motor carrier operating rights issued by them. The plenary authority given to the Interstate Commerce Commission in Section 5 was never intended to embrace all transfers; rather, it was intended to apply only to transfers of operating rights in connection with the merger, consolidation, or unification of existing carriers—not to the split-up of an existing carrier into two or more subsidiaries, each of which obviously would possess only a portion of the economic resources of the mother unit.

This is the first case in which the Courts have been called upon to determine the applicability of Section 5(2) to split-ups of operations.

The language of Section 5(2)(a)(i) of the Interstate Commerce Act is clear and unmistakable. It authorizes the Commission to give approval to five classes of transfers, as follows (italics added):

(1) "... for two or more *carriers* to consolidate or merge their properties or franchises .... into one corporation ...;"

* * *

(1) "... for any *carrier* .... to purchase, lease, or contract to operate the properties ... of *another*;"

* * *

(3) "... for any *carrier* ... to acquire control of *another* ...;"

* * *

(4) "... for a person which is *not a carrier* to acquire control of two or more carriers ...;"

* * *

(5) "... for a person which is *not a carrier* and which has control of one or more carriers to acquire control of another carrier ..."

In each of the first three instances, *all* the parties to the transaction must be *carriers,* and the transaction is either a merger of two or more *carriers* or the acquisition of one *carrier's* property or operations by *another.* It is conceded that Golden Gate is not yet a carrier—a conclusion which is compelled by the

definitions set forth in Sections 5(13) and 203(14). The proposed transfer, therefore, is not to a *carrier,* but only to an *expectant* or *would-be carrier.*

Only the fourth and fifth categories apply to non-carriers (which is Golden Gate's status), and then only if the non-carrier is to acquire control of another carrier or carriers. In this proceeding, the reverse situation exists, since the non-carrier (Golden Gate) is to be under the control of the carrier (Pacific Greyhound).

Thus, none of the provisions of Section 5(2) even remotely covers the split-up of a carrier's operations by transfer of a portion to a newly created corporation which is neither operating nor authorized to operate as a carrier.

That Congress was aware of this distinction is shown by Section 20a(1) of the Interstate Commerce Act, which provides (in connection with issuance of securities) that, as used in that section,

> ". . . the term 'carrier' means a common carrier by railroad . . . *or any corporation organized for the purpose of engaging in transportation by railroad . . .*" (Italics added.)

There are good and sufficient reasons why Congress limited the extraordinary provisions of Section 5 to consolidations, mergers, and unifications. The legislative history of Section 5 shows that it was enacted (as part of the Transportation Act of 1940) to provide some means of relief to a very sick industry. The Senate Report points out that one-third of the railroad mileage in the country was already in bank-

ruptcy and another third was tottering on the verge. (S.R. 433, 76 Congress, First Session, May 16, 1939, p. 1.) Since 1920, the Interstate Commerce Act had required the Interstate Commerce Commission to take the initiative in proposing consolidation plans, but this approach "was not bearing fruit", and it had become apparent that

> "waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements. The Transportation Act of 1940 relieved the Commission of formulating a nationwide plan of consolidations. Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of *merger or consolidation* if . . . the proposed transaction met with certain tests . . . in which case they should become effective regardless of state authority." (Italics added.)
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> *Schwabacher v. United States* (1948) 334 U.S. 182.

The various House and Senate Reports all refer to Section 5 as a vehicle for expediting consolidations, mergers, unifications, and pooling arrangements in order to prevent sick carriers from dying and to enable weak carriers to strengthen each other. So urgent was the need, and so desperate the economic plight of the carriers, that Congress provided, in Section 5(11), that a plan approved by the Interstate Commerce Commission could be put into effect without obtaining the approval which might otherwise be required from other federal agencies or from state agencies. See S.R. 433, *supra;* H.R. 1217, 76th Congress, First Session, July 18, 1939; H.R. 2016, 76th Congress, Third Session, April 26, 1940; H.R. 2832,

76th Congress, Third Session, August 7, 1940. See *St. Joe Paper Co. v. Atlantic Coast Line R. Co.* (1954) 347 U. S. 298, 315 (appendix), for a summary of the legislative history of Section 5.

This severe remedy was meant to enable weak carriers to gain strength by combining. Appellees would use it to permit a carrier to subdivide itself into smaller and separate units—the very antithesis of the purpose of Section 5.

If Congress had intended the extraordinary procedure of Section 5, with a complete by-passing of other federal agencies and state agencies, to apply to split-ups, it would most certainly have mentioned split-ups in the committee reports, if not in the statute itself. The reports use the terms "pooling", "consolidations", "mergers", and "unifications", but nowhere is there any reference, directly or indirectly, to a "split-up" or any similar term. And not only was the problem of a sick transportation industry considered at length by Congressional committees, but it had also been the subject of study by a special Committee of Six, consisting of three management and three labor representatives, appointed by the President in 1938. (See S.R. 433, 76th Congress, First Session, May 16, 1939.)

There is no basis for the suggestion in the opinion of the Court below that if Section 5 should be held inapplicable, Pacific Greyhound would be "free to make substantial alterations in its corporate structure, to create subsidiaries to take over part of its existing operation, or perhaps to venture into new areas, without the necessity of seeking Commission

approval" (T.171). The Interstate Commerce Commission would clearly have jurisdiction over the transfer of interstate operating rights under Section 212(b), which provides that "Except as provided in Section 5" interstate motor carrier operating rights may be transferred pursuant to rules and regulations prescribed by the Commission.

Section 5 clearly applies to the transfer of an operating right from an existing carrier to an existing carrier. If Section 5 also applies to the transfer of an operating right from a carrier to a non-carrier, on the theory announced in this case that upon consummation of the transaction the transferee would fall under Section 5, Section 212(b) would be completely meaningless. It is to be presumed that Congress had some area in mind for the applicability of Section 212(b), and that area exists only if Section 5 is limited to the consolidation and merger type of transactions.

Under well-established rules of statutory construction, Sections 5 and 212(b) should be construed in such a way as to give effect to both, and render neither "superfluous, void, or insignificant." And that cannot be done under the interpretation adopted by the lower Court.

Washington Market Co. v. Hoffman (1879) 101 U.S. 112, 116;

Ex Parte The Public National Bank of New York (1928) 78 U.S. 101, 104;

D. Ginsberg & Sons, Inc. v. Popkin (1932) 285 U.S. 204, 208.

It is to be noted that when Pacific Greyhound, Golden Gate, and the Greyhound Corporation filed

their application with the Commission, they prayed for authorization under Section 5 *or under Section 212(b)* if Section 5 were deemed inapplicable. Had the application been processed under Section 212(b) and transfer only of the interstate rights been authorized, we could not challenge the jurisdiction of the Commission; but in that event no transfer of the intrastate rights (which as a practical matter constitute almost the entire operation) could be made without first getting the approval of the state Public Utilities Commission.

The economic vice of the holding that Section 5 applies is that the state Public Utilities Commission, which has the direct regulatory responsibility for protecting the public interest with regard to substantially all of the operations involved, is completely bypassed, and the determination of public interest is made by a body (the Interstate Commerce Commission) which has regulatory responsibility for only a negligible portion of the operations. This anomalous result could be suffered if it were an inevitable by-product of the consolidation and merger rules which Congress deemed necessary when enacting Section 5. But the grant of plenary authority to the Interstate Commerce Commission goes only as far as the special measures which were authorized to strengthen weak carriers in a sick industry, and no further.

2. The denial by the lower Court of appellants' motion for leave to amend their complaint places an unduly restrictive limitation on the amendment of complaints contrary to the liberal rule embodied in Rule 15(a) of the Federal Rules of Procedure and in conflict with the decisions of other Courts.

The decision of the Court below states that an amendment which completely changes the theory of the case after the case has been submitted to the Court on another theory should not be permitted "without some showing of lack of knowledge, mistake or inadvertence on the part of the party seeking amendment, or some change of conditions of which that party had no knowledge or control" (T. 172).

The situation here is that the complaint initially raised only the legal question of the jurisdiction of the Interstate Commerce Commission, and that legal question was argued and submitted on a motion to dismiss and a motion for judgment on the pleadings. At the time of argument of that legal issue, counsel for appellants asked permission to amend his complaint to challenge the action of the Interstate Commerce Commission on the additional grounds (without abandonment of the jurisdictional question) that the findings of the Interstate Commerce Commission were not supported by the evidence in certain specified requests and that the Commission had abused its discretion in denying a petition for rehearing and reconsideration.

This motion and the proposed amendment were formally submitted in writing promptly thereafter, and the Court heard argument thereon some two months later, in April, 1956. Among the findings of the Commission which the amendment sought to challenge was the Commission's conclusion that the transfer of the local operations to Golden Gate would serve the public interest by separating the negotiation of employment contracts relating to the local drivers from those relating to the inter-city drivers, thereby minimizing the

possibility that a dispute with one group of drivers would result in a strike by the other group as well. The proposed amendment recited that on February 21, 1956 (two days prior to the argument of the motion to dismiss and the motion for judgment on the pleadings), Pacific Greyhound and Golden Gate had entered into an agreement with the various labor unions to the effect that if the proposed transaction were consummated the employees of Pacific Greyhound and Golden Gate would be covered by a single employment contract. Significantly enough, the labor unions who had originally been plaintiffs in this action stipulated to a dismissal with prejudice contemporaneously with the execution of this agreement (T. 111-3).

The only showing made by appellees in opposition to the motion to amend is contained in an affidavit by one of Pacific Greyhound's attorneys to the effect that prior to the filing of the complaint herein counsel for appellants informed him that he intended to raise only the question of the Commission's jurisdiction and did not intend to challenge the findings of the Commission (T. 164-6). There was no showing of any type of prejudice which might result to appellees from the raising of the additional grounds of attack on the Commission's order in February, 1956 (when the motion to amend was made), rather than in October, 1955 (when the original complaint was filed), nor does the opinion of the Court give any intimation of such prejudice.

Since the Court itself did not announce its ruling on the motion to amend until April, 1957, fourteen months after the motion was filed, the denial of the

motion can hardly be defended on the ground that the delay in final disposition of the matter would be prejudicial to appellees.

Appellants do not contend that the amendment should have been permitted in order to relieve them from inadvertence or neglect. On the contrary, they state that the limitation of the original complaint to the jurisdictional question was a considered decision made by their counsel and that the motion to amend was based on the conclusion of their counsel, after further consideration of the matter (particularly after the negotiation of a labor contract directly contrary to one of the Commission's public interest findings) that the Commission's action should be challenged on the additional grounds set forth in the proposed amendment.

Thus, appellants contend that a judgment decision of an attorney as to the legal theory on which the action should be conducted is a proper basis for amendment, and that in the absence of prejudice to the other parties, it is an abuse of discretion for the Court to refuse leave to amend.

Rule 15 of the Federal Rules of Civil Procedure sets forth a liberal policy of permitting amendments to pleadings, to the end that a controversy may be fully tried on all issues.

Subsection (a) reads in part as follows:

> "(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed

upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires . . .*" (Emphasis supplied.)

Subsection (b) permits amendments to conform to the evidence, even after judgment.

Subsection (d) even authorizes supplemental pleadings to set forth transactions occurring since the date of the prior pleadings.

The application of Rule 15 by both trial and appellate Courts shows a uniform spirit of liberality in granting leave to amend. Even though the granting of such leave after a responsive pleading has been filed[3] is a matter of judicial discretion, there have been numerous reversals on appeal where strong affirmative reasons for denying leave to amend are not shown.

Lloyd v. United Liquors Corp. (CA 6, 1953) 203 F.2d 789;

Doehler Metal Furniture Co. v. United States (CA 2, 1945) 149 F.2d 130;

Maryland Casualty Co. v. Rickenbaker (CA 4, 1944) 146 F.2d 751;

Atlantic Coast Line R. Co. v. Mims (CA 5, 1952) 199 F.2d 582;

Rogers v. Girard Trust Co. (CA 6, 1947) 159 F.2d 239.

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[3]It may be noted, parenthetically, that Pacific Greyhound, Golden Gate, and Greyhound Corporation never have filed a responsive pleading in this case, although the United States and the Interstate Commerce Commission have done so.

In a three-judge Court case involving review of an Interstate Commerce Commission order, the plaintiff was permitted to amend his complaint on the day of the trial to set forth a completely new ground. See *L. A. Tucker Truck Lines, Inc. v. United States* (E.D. Mo. 1951) 100 F.Supp. 432, 434, where the Court said:

> "Amendments to pleadings are largely discretionary with the courts and the courts have repeatedly held that amendments to pleadings should be allowed with great liberality at any stage of the proceedings unless violative of settled law or prejudicial to rights of opposing parties. The courts have been very liberal in permitting amendments where it is necessary to bring about a furtherance of justice."

The timeliness of the application is significant only on the question of whether the opposing parties will be substantially prejudiced. Delay of itself is not ground for reversal, nor is there any requirement of diligence or excusable neglect (as there would be in a motion to set aside a judgment).

Armstrong Cork Co. v. Patterson-Sargent Co. (D.C. Ohio, 1950) 10 F.R.D. 534;

Markert v. Swift & Co., Inc. (CA 2, 1949) 173 F.2d 517;

Maryland Casualty Co. v. Rickenbaker (CA 4, 1944) 146 F.2d 751.

See also:

McDowall v. Orr Felt & Blanket Co. (CA 6, 1944) 146 F.2d 136.

We can perceive no substantial prejudice to any of the appellees from permitting appellants to raise their

additional grounds of attack on the Interstate Commerce Commission order in February, 1956, as distinguished from having raised them in the original complaint filed in October, 1955. The case was not yet fully at issue, since the Defendants in Intervention had not filed their answer. Indeed, Defendants in Intervention did not even make their motion to intervene until January 9, 1956, almost three months after the action was filed, and only six weeks before leave to amend was sought.

The proposed amendment to the complaint raises substantial questions going to the merits and validity of the order under review. The case is one of considerable public importance and should not be disposed of without consideration of these matters. As the dissenting opinion concludes, the amendment should be permitted in the interests of justice, and consideration should be given to a remand to the Interstate Commerce Commission for further proceedings (T. 180).

Dated, August 21, 1957.

Respectfully submitted,

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(Appendices A, B, C and D Follow.)